Office-Supreme Court, U.S.
FILED
MAY 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 94, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

State of South Carolina,

Plaintiff,

vs.

Donald T. Regan, Secretary of the Treasury of the United States of America,

Defendant.

REPLY BRIEF OF PLAINTIFF

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QUESTIONS PRESENTED

I. Can the Court's original jurisdiction provided for by Article III, Section 2 of the United States Constitution be restricted by federal statutes?

II. Should the Court in its discretion exercise original jurisdiction here?

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ARGUMENT

I. The Court's original jurisdiction provided for by Article III, Section 2 of the United States Constitution cannot be restricted by federal statutes.

The second paragraph of Article III, Section 2 of the United States Constitution provides as follows:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make.

The defendant asserts that, notwithstanding this constitutional provision, the present action is barred by two federal statutes, the Anti-Injunction Act [26 U.S.C. 7421(a)] and the Declaratory Judgment Act [28 U.S.C. 2201], both of which prohibit litigation with respect to federal taxes.

But Congress may neither enlarge nor diminish the original jurisdiction of the United States Supreme Court. In California v.

Southern Pacific Railroad Co., 157 U.S. 229 (1895), the Court, relying on Marbury v. Madison, 5 U.S. (1 Cranch), 60 (1803), declared:

> It was held at an early day that Congress could neither enlarge nor restrict the original jurisdiction of this court.... 157 U.S. at 261.

See also, Wisconsin v. Pelican Insurance Co., 127 U.S. 265 (1888); South Carolina v. Katzenbach, 383 U.S. 301 at 357 n.1 (1966) (Black, J., dissenting); California v. Arizona, 440 U.S. 59 (1979); see generally, 12 MOORE'S FEDERAL PRACTICE ¶ 350.01[2]; 17 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 4043. This action, being one in which a State is a party and arising under the United States Constitution, is within the Court's original jurisdiction. Accordingly, neither the Anti-Injunction Act nor the Declaratory Judgment Act has any application to the right of the Court to hear and

determine this action. [1]

The defendant also argues that, assuming the Court has jurisdiction, it should decline to exercise it because the jurisdiction is not exclusive. See, Brief in Opposition at 11-12. In reality, the defendant actually reinforces the correctness of South Carolina's statement that, unless the Court accepts jurisdiction, South Carolina has no forum in which to contest the constitutionality of the challenged provision. See, Motion for Leave to File Complaint at 38-39. The defendant has effectively pointed out the statutory barriers which face this action in any lower court. He should not be allowed to assert on the one

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[1] Congress itself has recently observed that it has no power to withdraw the Court's original jurisdiction. In enacting the Diplomatic Relations Act of 1978, which changed the Court's original jurisdiction of actions involving ambassadors or foreign states from exclusive to concurrent, the Senate Judiciary Committee report concluded that "Congress may not deny to the Supreme Court jurisdiction which is expressly granted by the Constitution." S. REP. No. 1108, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & AD. NEWS 1941, 1947.

hand that the Court should decline jurisdiction because of its non-exclusivity and at the same time argue the applicability of the statutes which prohibit the hearing of this action in a lower federal court.

South Carolina's standing arises from the United States Constitution and the defendant asks the Court to reject that standing based on statute. But the intent of the framers of the Constitution to keep the original jurisdiction of the Court intact and beyond the power of Congress to change is manifested by the clear language of Article III, Section 2 which expressly authorizes Congress to regulate only the appellate jurisdiction of the Court. As Alexander Hamilton observed, the Constitution ensures the sovereign States a forum whose dignity parallels their position in the federal system established by that document. **THE FEDERALIST PAPERS, No. 81 (Hamilton); see also, deTocqueville, DEMOCRACY**

IN AMERICA (Doubleday & Co. 1969) at 149-150.[2/]

To argue, as the defendant appears to do, that Congress can oust South Carolina not only from the lower federal courts but from the United States Supreme Court itself would nullify Section 2 of Article III and leave the sovereign States a right without a remedy.

II. The Court in its discretion should exercise original jurisdiction here.

The defendant also addresses the question of the extent of the burden imposed upon South Carolina by the registration requirement. See, Brief in Opposition at 10-11. While

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[2/] "The Supreme Court has been given higher standing than any known tribunal, both by the nature of its rights and by the categories subject to its jurisdiction.... Without them, the Constitution would be a dead letter; it is to them that the executive appeals to resist the encroachment of the legislative body, the legislature to defend itself against the assaults of the executive, the Union to make the states obey it, the States to rebuff the exaggerated pretensions of the Union ...."(Emphasis in original).

South Carolina will not reargue its position here, it does emphasize that the central question it raises is the power of Congress to subject the obligations of South Carolina to tax, as a consequence of non-registration or otherwise. [3/] This question cannot be resolved by weighing the regulatory burden borne by the States against inconvenience or lost revenues to the federal government. The framers of the Constitution sought to establish not a monarchy but a federal system whose very nature contemplates that degrees of inconvenience will necessarily result to the co-equal sovereigns. Because South Carolina's challenge goes to the essence of federalism,

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[3/] The defendant's reliance on Merchant's National Bank of Little Rock v. U.S., 101 U.S. 1 (1880), is completely misplaced. There, State bank notes used as currency were subject to federal taxation because the United States Constitution provides for an exclusive national currency. And in Smith v. Davis, 323 US 111 (1944), the Court upheld the ad valorem tax imposed by Georgia on federal open accounts because the Court found that those accounts did not constitute obligations of the United States to which tax immunity attached. See, Brief in Opposition at 8.

that is, the relative powers of the State and the United States, it cannot be answered by declaring that the challenged provision must be enforced in order to convenience the national government.

The Court has the power to hear this case. As the defendant himself points out [see, Brief in Opposition at 4-6], there is no other forum available to South Carolina in light of the statutory restrictions which are applicable to the lower federal courts. Twenty-four States have joined with South Carolina in urging the Court to assume original jurisdiction because of the substantial and direct constitutional question involved. Accordingly, South Carolina submits that the case is appropriate for the Court's exercise of its original jurisdiction.

CONCLUSION

To sum up,

(1) If the important constitutional question at issue is to receive judicial

review at all, this action must be heard by the United States Supreme Court;

(2) Article III, Section 2 of the Constitution establishes the Court's jurisdiction; and

(3) The very nature of the federal system precludes the defendant's argument of inconvenience to the national government.

For the reasons stated herein and in its brief in chief, South Carolina submits that the relief sought should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, KAREN LeCRAFT HENDERSON, counsel of record for the plaintiff and a member of the Bar of the Court, do hereby certify that, in accordance with Rule 28.4(a), three (3) copies of the Reply Brief of Plaintiff were served on all parties required to be served on this date by depositing same in the United States mail, first-class postage prepaid, and addressed as follows: The Solicitor General of the United States, Department of Justice, Washington, D.C. 20530 and The Honorable Donald T. Regan, Secretary of the United States Treasury, Department of the Treasury, 1500 Pennsylvania Avenue, N.W., Washington,D.C. 20220.

This 17 day of May, 1983.

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